	DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING ***ENFORCEMENT DIVISION DIRECTIVE***	**DIRECTIVE NUMBER** **217** **DISTRIBUTION DATE** **October 1, 1998**

1. **SUBJECT: CALIFORNIA FAMILY RIGHTS ACT COMPLAINTS**

2. **PURPOSE**: To set forth the procedures for accepting complaints involving the California Family Rights Act (CFRA).

3. **BACKGROUND**: In January 1992, California enacted the Family Rights Act which was made a part of the Fair Employment and Housing Act (FEHA). In 1993, significant changes were made to the California Family Rights Act (CFRA) provisions of the FEHA to incorporate some of the provisions of the Federal Family and Medical Leave Act (FMLA), which became effective August 5, 1993. In 1995, the Fair Employment and Housing Commission (FEHC) passed new regulations interpreting CFRA.

CFRA requires certain employers doing business in California to provide eligible employees up to 12 weeks of leave in a 12-month period for:

- the birth, adoption, or foster-care placement of a child;
- an employee's own serious health condition; or
- the serious health condition of a parent, child, or spouse,

with a right to reinstatement to the same or comparable position.

4. **PROCEDURES**:

A. **Covered Employers**:

Employers doing business in California and employing 50 or more part-time or full-time employees in any state are subject to the CFRA. For purposes of CFRA, covered employers ***include*** *nonprofit religious organizations* and the State of California. It also includes any political subdivision of the State and local municipalities, regardless of the number of employees.

B. **Eligible Employees**:

1) Persons who work for an employer subject to the CFRA are eligible for CFRA leave if they:

a) Are a full-time or part-time employee working in California;

b) Have worked for the employer (at any time) for a period of 12 months;

c) Have worked at least 1,250 hours in the 12-month period before the date the leave commences; and

d) Work at a location in which the employer has at least 50 employees within 75 miles of the employee's worksite.

2) There may be some restrictions on CFRA-eligible employees who work for the same employer. For purposes of the birth, adoption, or foster-care placement of a child, the employer may limit the leave to 12 work weeks in a 12-month period **divided between** the two parents (regardless of whether they are married or not married to each other).

C. **Allowable Conditions Justifying Leave**:

1) CFRA leave may be taken for the following reasons:

a) the birth of a child for purposes of bonding;

b) the placement of a child in the employee's home for foster care or adoption.

c) the serious health condition of the employee's parent, child, or spouse; or

d) the employee's own serious health condition (excluding pregnancy disability).

2) Under the FEHA and the FEHC Regulations, a **serious health condition** is any illness, injury (including on-the-job injuries), impairment, or physical or mental condition of the employee or a child, parent or spouse of the employee that involves either:

a) Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential health care facility; or

b) Continuing treatment or supervision by a health-care provider.

Under this definition, therefore, a serious health condition can include chronic medical conditions (such as asthma, diabetes or epilepsy) that may flare up periodically and require intermittent time off, or conditions that require regular multiple treatments, such as physical therapy or radiation.

3) Because California has a separate law regarding leave rights of women who are disabled by pregnancy (Gov. Code, § 12945), pregnancy disability leaves *are not* a serious health condition covered by the CFRA.

D. **Leave Entitlement**:

1) The **maximum leave** to which an eligible employee is entitled under the CFRA is up to 12 work weeks in a 12-month period. The leave *does not* need to be taken in one continuous period.

2) CFRA leave for **part-time** employees or employees on **alternative work schedules** is determined by the number of working days that constitutes 12 work weeks calculated on a pro rata or proportional basis.

3) The **minimum leave** duration of a CFRA leave is two weeks when taken for the birth, adoption, or foster-care placement of a child. However, an employer shall grant a request for a CFRA leave for the period of less than two weeks duration on any two (2) occasions. Leave for the birth, adoption, or foster-care placement of a child *must be completed within one year* of the qualifying event.

There is, however, basically **no minimum duration of leave** for serious health conditions. Leave for serious health conditions may be taken intermittently or on a reduced work schedule in whatever increments of time that are medically necessary as certified by the health care provider of the person with the serious medical condition. However, an employer may limit leave increments to the shortest period of time the employer's payroll system uses to account for absences.

E. **Calculating the Leave Period**:

In calculating the 12-month period in which an employee can take a CFRA leave, employers can use *any one of four methods*, however they must apply the chosen method consistently and uniformly to all employees. The four methods of calculating the 12-month period are:

1) The calendar year;

2) Any fixed "leave year" of 12 months, such as a fiscal year or a year starting on the employee's anniversary date;

3) The 12-month period measured from the date an employee's first CFRA (or FMLA) leave begins; or

4) A rolling 12-month period measured backward from the date an employee uses any leave.

F. **Obligations of Employers**:

Under the provisions of the CFRA, there are certain *requirements of employers*. Some of these are:

1) Employers are required to **provide notice to employees** of the right to request a CFRA leave. This includes:

a) Posting the notice in a conspicuous place or places where employees tend to congregate. The FEHC Regulations, section 7297.9, subdivision (d), provide a sample notice which contains the minimum requirements for such posting.

b) Publishing the notice in the employee handbook if the employer publishes a handbook describing other kinds of personal or disability leaves available to its employees.

c) Giving a copy of the notice to each current and new employee, ensuring that copies are otherwise available to each current and new employee, and disseminating the notice in any other way.

d) Translating the notice of right to request CFRA leave in languages other than English when the employer has a workforce at any facility or establishment where ten percent (10%) or more of the employees speak a language other than English as their primary language. The notice shall be translated into the language(s) spoken by these employees.

2) Employers shall **respond to CFRA leave requests** within two (2) business days and, in any event, no later than ten (10) calendar days after receiving the request. Employers should try to respond to leave requests before the date the leave is to begin.

3) Employers are required to **continue health care coverage** for employees during their CFRA leaves if they provide health benefits under any group health plan. This is limited, however, to no more than 12 weeks in a 12-month period.

An employee on pregnancy disability leave whose health benefits have been paid for because the leave qualifies under the FMLA does not qualify for more than 12 weeks paid health benefits, even though the employee is entitled to CFRA leave after the pregnancy disability leave has ended.

4) Employers are required to **continue other benefits** for employees during their CFRA leaves, including:

   a) accrual of seniority; and

   b) participation in employee benefit plans, including life insurance, short-term or long-term disability insurance, accident insurance, pension and retirement plans, and supplemental unemployment benefit plans.

Continuation of these benefits should be to the same extent and under the same conditions as any other leave granted by the employer for any reason other than a CFRA leave.

5) Employers must **reinstate employees to the same or comparable position** after return from a CFRA leave.

   a) Employment in a comparable position means employment in a position that is virtually identical to the employee's original position in terms of pay, benefits, and working conditions, including privileges, prerequisites, and status. It must involve the *same or substantially similar* duties and responsibilities, skills, effort, and authority. It must be performed at the same or geographically proximate worksite, and ordinarily means the same shift or same or equivalent work schedule.

   b) There are, however, some instances where an employer can deny reinstatement to an employee who has taken a CFRA leave. Some of these are:

      - Where the position ceased to exist, such as in a layoff.

      - Where the employee who is taking the leave is a key employee (salaried and among the highest-paid 10 percent of the workforce), **and** the denial of reinstatement is necessary to prevent substantial and grievous economic injury to the operations of the employer. In these instances, the employer **must notify** the employee of the intent to refuse reinstatement at the time the employer determines the refusal is necessary as well as give the employee a reasonable opportunity to return to work.

G. **Obligations of Employees**:

Under the provisions of the CFRA, there are certain *requirements of employees*. Some of these are:

1) Employees must give advance notice in requesting a CFRA leave.

   a) When possible, an employer may require 30 days advance notice before a CFRA leave is to begin if the need for the leave is foreseeable.

   b) If the 30 days is not practicable (e.g., lack of knowledge of approximately when the leave will be required to begin, a change in circumstances, a medical emergency, etc.), notice must be given as soon as practicable.

   c) An employee or employee's spokesperson shall provide at least verbal notice sufficient to make the employer aware of the employee's need for a CFRA-qualifying leave, state the reasons for the leave, and the anticipated timing and duration of the leave.

2) Employees may need to **provide a written medical certification** to their employer of the serious health condition of the employee, or the employee's child, parent or spouse. Such certification is sufficient if it includes:

   a) the date on which the serious health condition commenced;

   b) the probable duration of the condition;

   c) an estimate of the amount of time the employee needs to care for the sick family member, and

   d) a statement that the employee, due to the serious health condition, is unable to perform one or more of the essential functions of his/her job, ***or*** a statement that the serious health condition warrants the participation of a family member to provide care during the period of treatment or medical supervision.

   e) The employer **may not require** the health certification to identify the serious health condition.

3) Employees may be required to use paid leave time for all or part of their CFRA leave.

H. **Relationship of CFRA/FMLA to Pregnancy Disability Leave (PDL)**:

Under the FEHA, the CFRA provisions are *separate and distinct* from the provisions of the FEHA regarding PDL. The FMLA, however, defines pregnancy and prenatal care as a "serious health condition" (see discussion under 4.I.1), below). Thus in California a woman disabled by pregnancy would be entitled to up to four months of PDL, and also be entitled to 12 weeks of CFRA if she is otherwise eligible. However, because pregnancy-related disabilities are covered under FMLA, FMLA runs concurrently with PDL. This might become important for purposes of continuation of insurance coverage (see 4.F.3), above). Also, employees taking a PDL are not required to use vacation time.

I. **Relationship of CFRA to FMLA**:

There are differences between CFRA and FMLA leaves. Under FMLA, however, where there is a conflict between the provisions of the FMLA and State law on any issue, the provision that provides the greater family or medical leave rights to the employee will prevail. Listed below are some of these differences:

1) The greatest distinction between CFRA and FMLA leaves is in the area of pregnancy disability as a serious health condition. Under the FMLA regulations, "any period of incapacity due to pregnancy, or for prenatal care is explicitly covered as a serious health condition." Under CFRA, "leave taken for disability on account of pregnancy, childbirth, or related medical conditions" is specifically excluded as CFRA leave. This is due to the separate PDL provisions of the FEHA (as explained in 4.H., above).

2) Another distinction between CFRA and FMLA leaves pertains to employees who work for the same employer. Under FMLA, spouses working for the same employer are entitled to 12 weeks of leave divided between the two of them for the birth or placement of a child for adoption or foster care, whereas CFRA limits parents who work for the same employer to 12 weeks leave divided between the two of them regardless of whether they are married to each other.

3) CFRA and FMLA leaves also differ in the types of medical certification that can be requested by employers. CFRA *does not require* the employee or doctor to specify the nature of the serious health condition of either the employee or the employee's parent, child or spouse when providing medical certification to the employer. Under FMLA, an employer can inquire about the nature of the serious health condition.

4) Another difference between CFRA and FMLA leaves pertains to the differences in the medical certification regarding the serious health conditions of a family member. CFRA requires the employer to accept the medical certification of the family member's health care provider without an opportunity to request further medical opinion. FMLA allows an employer (at their own cost) to ask for second and, in some instances, third opinions regarding medical certification of a family member's serious illness. Since CFRA is more generous, California employers cannot ask for further medical opinions. (**NOTE**: When the leave is for an employee's own serious condition, both CFRA and FMLA allow the employer to seek, at their own cost, a second opinion, and a third opinion if the second opinion differs from the first.)

5) CFRA and FMLA leaves also differ in the area of use of accrued vacation time. If an employee who is taking a CFRA or FMLA leave requests time off for leave that is a CFRA/FMLA qualifying event (e.g., illness of a parent), the employer can insist that the employee use his/her accrued vacation time as part of the CFRA/FMLA leave. However, under CFRA regulations, if an employee requests to use accrued vacation time or other paid accrued time off without stating that it is for a CFRA/FMLA qualifying event, the employer may not ask whether the employee is taking the time off for a CFRA-qualifying purpose. FMLA allows the employer to ask that question.

6) CFRA and FMLA leaves also differ in the area of the birth of a child in that under the FMLA the leave must be taken all at once, but under the CFRA it can be taken in more than one period.

J. **Drafting of CFRA Complaints**:

In drafting CFRA complaints, Consultants will include the specifics regarding the date the complainant notified the employer of the need for a CFRA leave and the amount of leave requested. Also, complaints should have language explaining that the complainant meets the qualifying criteria for a CFRA leave. (Refer to Attachment 1 sample complaint.)

K. **Dual Filing With EEOC**:

1) CFRA complaints *will not* be dual filed with EEOC unless the complaint has at least one basis that is jurisdictional with EEOC (e.g., race, color, national origin, ancestry, etc.).

2) In those instances where a case is being waived to EEOC pursuant to the Mohasco decision (filed between 240 and 300 days after the first act of harm), **two** complaints will be accepted as follows:

a) **One** complaint will be taken alleging all bases except CFRA, and be dual filed and waived to EEOC for investigation; and

b) **One** complaint will be taken for the CFRA allegation. The complaint will remain with DFEH for investigation.

5. **APPROVAL:**

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Nancy C. Gutierrez, Director Date

SAMPLE CFRA COMPLAINT

Basic Complaint:

I. On September 15,1997 I was terminated from my position of Forklift Operator which paid $23.00 an hour. I was hired on October 4, 1988.

II. Clara Box, Personnel Manager, told me I was being terminated for taking too much time off work.

III. I believe I have been denied leave in violation of California Government Code section 12945.2 based on the following reasons:

A. On September 1, 1997, I advised my supervisor, John Smith, that my father was having open heart surgery and that he would require my assistance for a period of at least two weeks. I gave him a note from my father's physician.

B. When I returned to work on September 15, 1997, I was told by the Personnel Manager that my position was filled and that I was terminated.

C. I have worked for the company more than twelve (12) months, have worked at least 1,250 hours in the 12-month period prior to my leave, and work at a location that has at least 50 employees within 75 miles.

Other typical allegations:

I informed my employer that I needed to take time off while my husband was recovering from surgery. I was told by the Personnel Manager that the company had no policy on family leaves, and that if I took the time off, I would be terminated.

I telephoned my supervisor and advised her of the critical illness of my wife. Upon returning to work three days later, I was advised that my employment was terminated.

Upon returning from a four-week leave to care for my sick child, I was advised that I had been replaced on the day shift and would have to work at night.

My supervisor advised me that I was being fired for excessive use of sick leave, even though I had a doctor's certification for all my absences.